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Supreme Court of the United States

OCTOBER TERM, 1958

No. 735

JERRY KEITH ROGERS, Petitioner

v.

UNITED STATES OF AMERICA

Petition for Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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Supreme Court of the United States

OCTOBER TERM, 1958

No.

JERRY KEITH ROGERS, Petitioner

v.

UNITED STATES OF AMERICA

Petition for Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming the judgment of the United States District Court for the Western District of Washington, Northern Division, convicting the petitioner of a violation of the Universal Military Training and Service Act and sentencing him to the custody of the Attorney General.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. It is printed as Appendix A to this petition, *infra*, pages 9-15.

JURISDICTION

The judgment of the Court of Appeals was entered on February 2, 1959. (See Appendix B to this petition for writ of certiorari, *infra*, page 16.) The time for filing this petition for writ of certiorari expires March 4, 1959. This petition for writ of certiorari is filed within time. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1). (See also Rules 37(b) (2) and 45(a), Federal Rules of Criminal Procedure.) The District Court had jurisdiction under 18 U. S. C. § 3231.

QUESTIONS PRESENTED

I.

Whether the denial of the conscientious objector classification by the appeal board in this case was without basis in fact, making the final 1-A-O classification arbitrary and capricious.

II.

Whether the order quashing the subpoena *duces tecum* illegally denied the right to use the FBI report upon the trial to prove that the petitioner had been denied procedural due process of law before the appeal board through the omission and withholding of favorable evidence supporting the full conscientious objector claim appearing in the report that was not summarized by the Department of Justice and the résumé sent to the appeal board along with the recommendation, contrary to the Fifth Amendment to the Constitution.

STATUTES AND REGULATIONS INVOLVED

Section 6 (j) of the Universal Military Training and Service Act (62 Stat. 604, 612, 622; 65 Stat. 75, 86 (50 U. S. C. App. §456 (j))) is involved here. The pertinent part reads as follows:

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate. . . . Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of

Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of national health, safety, or interest as the local board may deem appropriate. * * * If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. * * * "

Section 1 (a) of the Universal Military Training and Service Act (50 U. S. C. App. § 451 (c)) provides:

"The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy." June 24, 1948, ch. 625, title I, § 1, 62 Stat. 604, amended June 19, 1951, ch. 144, title I, § 1 (a) 65 Stat. 75.

Sections 1622.11, 1622.14, 1626.25 (a), 1626.25 (b) and 1626.25 (c) of the Selective Service Regulations (32 C. F. R. § 1602 *et seq.*) are involved. These Regulations are extensive; so they are printed as Appendix C, *infra*, at pages 17-19.

STATEMENT OF THE CASE

Petitioner seeks review of a judgment of the United States Court of Appeals for the Ninth Circuit affirming the judgment of conviction entered by the United States District Court (see Appendices A and B, *infra*, pages 9-16). The judgment of the District Court was entered after a trial without a jury, finding petitioner guilty of refusing to submit to induction into the armed forces in violation of the Universal Military Training and Service Act. [R. 14]

The indictment in the District Court charged petitioner with unlawfully refusing to submit to induction into the armed forces. [R. 3-4] Petitioner pleaded not guilty and waived the right of trial by jury. [R. 11-13]

He caused to be issued a subpoena *duces tecum* upon the Agent in Charge of the FBI and upon the United States Attorney to produce the full and complete secret FBI investigative report used by the hearing officers of the Department of Justice in conducting hearings and making reports on the conscientious objections of petitioner. [R. 4] The Government moved to quash the subpoena. [R. 5] This was supported by an affidavit that petitioner had been supplied a summary of the investigative reports and the production of the reports could serve "no useful evidentiary purpose whatever in the trial of this cause and that the production of same would be contrary to the best interests of the people of the United States." [R. 7]

Petitioner answered the motion to quash by affidavit showing that the purpose of subpoenaing the secret FBI investigative reports was to establish that he was prejudiced before the appeal board because the Department of Justice withheld from the appeal board favorable evidence

and that until the FBI report was produced and compared with the résumé it would be impossible for the court to decide the question involved. [R. 8-9] The motion to quash was argued at great length. [R. 23-38] The court sustained the motion to quash. [R. 10]

The case proceeded to trial. The draft board file was received into evidence as Government's Exhibit 1. [R. 47-48] It is a photostatic copy of the entire draft board file, consisting of 102 pages. The pertinent facts appearing in the draft board file are adequately stated in the opinion of the Court of Appeals and reference is here made to such facts appearing at pages 9-12, *infra*.

REASON FOR GRANTING THE WRIT

Heretofore this Court has denied a petition for certiorari asking this Court to take jurisdiction and determine whether or not the quashing of the subpoena *duces tecum* commanding the production of the FBI report denied due process of law. The purpose of the subpoena was to show the registrant in a Selective Service proceeding was denied procedural due process of law by the withholding from the appeal board of evidence favorable to the registrant and making an inadequate summary of the original FBI report summarized and forwarded to the appeal board. See the petitions in *Bouziden* v. *United States*, No. 804, October Term, 1957, cert. denied 356 U. S. 927 (April 7, 1958), rehearing denied 356 U. S. 964 (May 19, 1958), and *Leifer* v. *United States*, No. 525, October Term, 1958, cert. denied 27 Law Week 3215 (January 26, 1959).

This Court, by the denial of certiorari in those cases, has seemingly found that there is no conflict in the holdings of the Courts of Appeals approving the orders quashing the subpoenas *duces tecum* and the holding of this Court in *Jencks* v. *United States*, 353 U. S. 657 (1957). But petitioner believes that there is a conflict of decision and that the rulings in the cases above referred to are out of harmony with the holding of this Court in *Jencks* v. *United*

States, 353 U. S. 657 (1957), and this Court is requested to reconsider the question of whether the decision by the court below is out of harmony with *Jencks* v. *United States*, 353 U. S. 657 (1957). In the event that the Court does not find that the holding of the court below is out of harmony with *Jencks* v. *United States*, 353 U. S. 657 (1957), then this Court is requested to determine whether the question here presented is an important question that has not been determined by this Court but that ought to be decided by this Court.

The importance of this question has been made more manifest by a recent decision of the United States District Court for the Southern District of New York in *United States* v. *Eliasson*, No. C. 156-264, February 2, 1959. By that decision the District Court having the largest volume of business of any district court in the United States has determined that the position here taken by the petitioner is correct and such court refused to follow *Bouziden* v. *United States*, 251 F. 2d 728 (10th Cir. 1958), cert. denied (No. 804, October Term, 1957) 356 U. S. 927, rehearing denied 356 U. S. 964, and *Blalock* v. *United States*, 247 F. 2d 615 (4th Cir. 1957), and held that *United States* v. *Nugent*, 346 U. S. 1 (1953), did not command that the original FBI reports be withheld from defendants in criminal cases. The opinion in that case is by Judge Dawson. It is printed in full, as Appendix D, *infra* pages 20-23. Because of the conflict in decision of the Southern District of New York with the Courts of Appeals for the Fourth, Ninth and Tenth Circuits this becomes an important question, national in scope, in the administration of the criminal sanctions clause of the Act so as to justify this Court in the granting of the writ of certiorari in this case.

CONCLUSION

Wherefore, for the reasons above stated, it is submitted that the Court ought to grant the petition for writ of certiorari and take this case in for a review of the judgment of the court below.

Respectfully submitted,

HAYDEN C. COVINGTON

124 Columbia Heights
Brooklyn 1, New York

Counsel for Petitioner.

February, 1959.

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JERRY KEITH ROGERS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 15,647
Feb. 2, 1959

Appeal from the United States District Court
for the Western District of Washington,
Northern Division.

Before: FEE and HAMLEY, Circuit Judges, and SOLOMON, District Judge.

SOLOMON, District Judge:

Appellant was convicted of violating the Selective Service Act by wilfully refusing to submit to induction in the armed forces of the United States as a noncombatant, Class I-AO. Appellant is a member of Jehovah's Witnesses. He claims he is conscientiously opposed to military service of any kind, including noncombatant service, and therefore should have been classified I-O.

At the time of his registration in 1950, appellant asserted that he was a conscientious objector and that by reason of his religious activities he should be classified as a minister of religion, Class IV-D. The local board denied such request and classified him I-A—available for military service. The Appeal Board affirmed that classification.

Thereafter, appellant's files were sent to the Department of Justice for a hearing with respect to appellant's character and good faith for an advisory opinion as required by § 6(j) of the Universal Training and Service Act. [50 U.S.C. App. § 456(j).] The Federal Bureau of Investigation made its report regarding appellant's sincerity of belief, and prior to the special hearing, appellant was furnished with a résumé of that report. The following is the pertinent portion of this résumé:

> "He has been employed as a stock clerk at Sears-Roebuck Company, and has been actively participating in the Jehovah's Witness Society. Neighbors, references and acquaintances state that he has been an active member of the society and that he enjoys an excellent reputation of character. There is nothing in the investigative report which would indicate he is not sincere in his claim to being a conscientious objector on the basis of his religious training and belief."

The Justice Department Hearing officer found that appellant was sincere in his objections to combat service, but he further found that appellant had not sustained his objections to noncombatant service. Both he and the Department of Justice recommended that appellant be classified I-AO. Thereafter, the Appeal Board gave him such classification.

Later, the local board again interviewed appellant and held a hearing in connection with his classification. There, appellant again claimed exemption as a conscientious objector and as a minister of religion. He stated that he was opposed to the use of force to defend his country but was willing to use force to defend himself, his home, his religious meetings, and the brethren of his religious organization. He further stated that his claim as a conscientious objector was based primarily upon his desire to preach and he further stated that even if he obtained the I-O classification

which he was requesting, he would not perform the civilian work to which he would be subject in such classification.

As a result of this hearing, the local board classified appellant I-AO. Appellant did not appeal from this classification, but the Government appeal agent did. In accordance with the statute, the case was again referred to the Department of Justice, and a second hearing held before a Hearing Officer. Prior to this second hearing, an investigation was again conducted and a report made concerning appellant's character and good faith. A copy of the résumé of such report, all of which was favorable and which contained the following pertinent provision, was furnished to the appellant prior to the hearing:

> "Neighbors, references, and religious affillates all agreed that the registrant is of excellent character and reputation and a sincere active member of Jehovah's Witnesses. None had any unfavorable information concerning the registrant's character; many of the same persons were previously interviewed and advised presently that they had no reason to change their opinion of the registrant. All persons interviewed believed that the registrant is sincere in his religious beliefs and in his attitude toward military service."

Both appellant and his mother testified before the Hearing Officer. In addition, the Hearing Officer reviewed all the evidence previously submitted. He recommended that appellant be classified I-AO. The Department of Justice concurred in such recommendation. Thereafter, the appellant wrote the Appeal Board:

> "My claim for exemption as a conscientious objector is based solely on the fact that I am a regularly ordained minister of the gospel."

The Appeal Board on the basis of the entire record again classified him I-AO. Based upon such classification, appellant was ordered to report for induction in the armed

forces as a noncombatant. He appeared, but refused to be inducted. The present prosecution and conviction followed.

Prior to the trial, appellant served a subpoena duces tecum on the United States Attorney directing him to produce the complete secret investigative reports of the Federal Bureau of Investigation for the purpose of determining whether favorable information had been withheld from the Appeal Board. The Government moved to quash the subpoena and the trial court granted the motion. Thereafter appellant was tried by the court and from the judgment of conviction and sentence, he appealed.

In this appeal appellant contends that (1) the classification I-AO by the Appeal Board was arbitrary, capricious and without basis in fact, and (2) the trial court erred in granting the motion to quash the subpoena duces tecum directing the Government to produce full F.B.I. investigative report.

I

In order to set aside a selective service classification, a court must find that there is no basis in fact for the classification [*Witmer v. United States*, 348 U.S. 375; *Cox v. United States*, 332 U.S. 442].

We have carefully examined appellant's selective service file and find that he has failed to establish the lack of a factual basis for his classification. Prior to the Appeal Board's final classification of I-AO which resulted in the order for induction, appellant's case had received repeated attention over a period of five years. Appellant submitted evidence and was personally interviewed by his local draft board on two occasions. He appeared before two Justice Department Hearing Officers, where he and his witnesses testified and presented other evidence. All of these people were called upon to evaluate appellant's mental attitude and beliefs. It is significant that not one of them concluded that he was entitled to a I-O classification. [See *Blalock v. United States*, 4 Cir. 1957, 247 F.2d 615.]

In addition to evidence concerning his secular employment and his attitude toward war and killing, appellant's final statement to the Appeal Board was that his "claim for exemption as a conscientious objector is based solely on the fact that I am a regularly ordained minister of the Gospel." The Board had previously found that he was only a "publisher", that is, an ordinary member, as distinguished from a "company servant", a position comparable to a minister, and that appellant was not entitled to a ministerial classification. That appellant would be taken away from his religious work, absent a finding of ministerial status, is not an objection which the Act recognizes. [*Tomlinson v. United States*, 9 Cir. 1954, 216 F.2d 12.]

The trial court correctly found that there was a basis in fact for the classification given appellant by the Appeal Board.

II

Appellant's next contention is that he was entitled to have produced at his trial in the District Court, the full reports of the F.B.I. in order to test and determine whether the résumés of such reports sent to the Appeal Board omitted evidence favorable to him.

There is no merit in this contention.

The résumé of both reports contain only laudatory statements concerning appellant's character, reputation and sincerity. They specifically point out that the investigators obtained no adverse reports or any information which would indicate that appellant was insincere. It is difficult to imagine how appellant could have been prejudiced by not seeing the complete investigative file.

In *Nugent v. United States*, 346 U.S. 1, the Supreme Court held that a registrant is not entitled to the original investigative report and that he is only entitled to a "fair résumé of any adverse evidence in the investigator's report."

In *Kaling v. United States*, 9 Cir. 1956, 235 F.2d 54, appellant argued that at the trial he was entitled to see

the full F.B.I. report to see whether he had been sent a fair résumé.

In disposing of that contention, the Court stated:

> "Appellant was given a résumé of the report as required under the holding of United States v. Nugent, 1953, 346 U.S. 1, 73 S.Ct. 991, 97 L.Ed. 1417, and Simmons v. United States, 1955, 348 U. S. 397, 75 S. Ct. 397, 99 L.Ed. 453. Our decision in White v. United States, 9 Cir., 1954, 215 F. 2d 782 supra, and the Fourth Circuit's decision in Campbell v. United States, 4 Cir., 1955, 221 F.2d 454, 460, are dispositive of the point."

Appellant contends that these holdings are no longer to be followed because they are out of harmony with *Jencks v. United States*, 353 U.S. 657.

In *Blalock v. United States*, 4 Cir. 1957, 247 F.2d 615, which involved an almost identical factual situation, the same contention was made. In an able and exhaustive opinion, Judge Simon Sobeloff analyzed *Nugent* in the light of *Jencks* and came to the conclusion:

> "Whatever may be the boundaries and limitations of the Jencks doctrine, we think it clear that it is subject to the qualification of the Nugent case for the type of problem here involved, that is, testing the accuracy of the résumé furnished in conscientious objector cases, in contrast to impeachment of witnesses in criminal cases. The Nugent case explicitly holds that if the defendant was furnished a résumé and accorded an opportunity to be heard, he cannot complain that he was not shown the investigative records, nor can he insist on their production at the criminal trial."

Judge Sobeloff also rejected the claimed distinction repeated here that Nugent is limited to cases in which registrants sought records for rebuttal of adverse evidence at the hearing and should not include a case in which the

registrant seeks to discover from the F.B.I. reports, additional evidence favorable to the registrant at the trial stage.

This holding was specifically approved in *Bouziden v. United States*, 10 Cir. 1958, 251 F.2d 728, which involved a résumé containing both favorable and unfavorable reports.

The trial court did not err in granting the motion to quash the subpoena duces tecum directing the production of the complete F.B.I. files pertaining to appellant.

AFFIRMED.

(Endorsed:) Opinion. Filed Feb. 2, 1959.

Paul P. O'Brien, Clerk.

APPENDIX B

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JERRY KEITH ROGERS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 15647

JUDGMENT

Appeal from the United States District Court for the Western District of Washington, Northern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Filed and entered Judgment
February 2, 1959
PAUL P. O'BRIEN, Clerk

APPENDIX C

Regulations Involved

Section 1622.11 of the Regulations (32 C. F. R. § 1622.11: E. O. 10292, 16 F. R. 9862, Sept. 28, 1951) reads as follows:

§ 1622.11 *Class I-A-O: Conscientious objector available for noncombatant military service only.* (a) In Class I-A-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to combatant training and service in the armed forces.

(b) Section 6 (j) of title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.

Section 1622.14 of the Regulations (32 C. F. R. § 1622.14; E.O. 10425, 17 F. R. 11593, Dec. 19, 1952) reads as follows:

§1622.14 *Class I-O: Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest.* (a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces.

(b) Section 6 (j) of title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

Religious training and belief in this connection means an

individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.

(Section 1622.14 (b) contained in E. O. 10292, 16 F. R. 9862, Sept. 28, 1951.)

Sections 1626.25 (a), 1626.25 (b) and 1626.25 (c) of the Regulations (32 C. F. R. §§ 1626.25 (a), 1626.25 (b) and 1626.25 (c); E. O. 10363, 17 F. R. 5456, June 18, 1952) read as follows:

§ 1626.25 *Special provisions when appeal involves claim that registrant is a conscientious objector.* (a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:

(1) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to participation in combatant training and service in the armed forces, but not conscientiously opposed to participation in noncombatant training and service in the armed forces, and the local board has classified the registrant in Class I-A-O, the appeal board shall proceed with the classification of the registrant. If, in such a case, the local board has classified the registrant in any class other than Class I-A-O, the appeal board shall transmit the entire file to the United States Attorney for the Federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.

(2) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces, and the local board has classified the registrant in Class I-O, the

appeal board shall proceed with the classification of the registrant. If, in such a case, the local board has classified the registrant in any class other than Class I-O, the appeal board shall transmit the entire file to the United States Attorney for the Federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.

(b) Whenever a registrant's file is forwarded to the United States Attorney in accordance with paragraph (a) of this section, the Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform, for a period of twenty-four consecutive months, civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

(c) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant the letter containing the recommendation of the Department of Justice.

APPENDIX D

Eliasson Opinion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

ERIC WALTER ELIASSON,

Defendant.

C. 156-264

APPEARANCES:

ARTHUR H. CHRISTY, ESQ., United States Attorney, Southern District of New York
ALBUM C. MARTIN, ESQ., Assistant United States Attorney
Of Counsel

HAYDEN C. COVINGTON, ESQ., of Brooklyn, N. Y.
Attorney for Defendant

DAWSON, D. J.:

This is a motion by the defendant for an order directing the United States Attorney to produce for examination, inspection and copying the reports of a certain agent, or agents, of the Federal Bureau of Investigation, which were used by the Hearing Officer and an Assistant Attorney General in their investigation and determination of the claim for deferment of the defendant under the Universal Military Training and Service Act, and for an order directing the United States Attorney, or the Department

of Justice, or the Hearing Officer to produce for examination, inspection and copying the longhand notes or any typewritten minutes or stenographic minutes of the hearing conducted by the Hearing Officer which were used in the investigation and determination of the claim for deferment of the defendant. The latter part of the motion for production of the longhand notes or the typewritten minutes of the hearing was withdrawn by the attorney for the defendant at the oral argument. This leaves, therefore, the question of whether the Government should be directed to produce the F.B.I. reports used by the Hearing Officer in his investigation and determination of the claim for deferment of the defendant.

The defendant has been charged in a one count information with failure to submit for induction into the Armed Forces of the United States in violation of the Universal Military Training and Service Act, Title 50 Appendix, U.S.C. § 462. Defendant claims to be a conscientious objector. His claim was denied by his Local Board.

Under the Selective Service Act of 1948, a person whose claim for exemption as a conscientious objector has been rejected by his Local Draft Board may appeal to an Appeal Board, which is required to refer the claim to the Department of Justice for its recommendation, which the Appeal Board is required to consider but is not bound to follow. Before making any recommendation the Department of Justice is required to make appropriate inquiry and to hold a hearing. At the hearing the appellant is allowed to appear in person. Upon request he is entitled to be instructed as to the general nature and character of any unfavorable evidence developed by the investigation but he is not permitted to see the investigator's reports nor be informed of the names of the persons interviewed by the investigator. See *United States* v. *Nugent*, 346 U.S. 1 (1953). The United States Supreme Court has held that this procedure is consonant with the constitutional provisions of the Fifth Amendment. The Court stated:

> ". . . We think the Department of Justice satisfies its duties under § 6(j) when it accords a fair opportunity to the registrant to speak his piece before an impartial hearing officer; when it permits him to produce all relevant evidence in his own behalf and at the same time supplies him with a fair resume of any adverse evidence in the investigator's report."
> *United States* v. *Nugent*, 346 U.S. at p.6.

Since the time of the *Nugent* decision the Department of Justice apparently furnishes a resume of the investigator's report to the person under investigation; and such resume was provided in this case. The furnishing of such a resume is not a matter of grace but has been held by the Supreme Court to be "an essential element in the processing of conscientious objector claims." *United States* v. *Simmons*, 348 U. S. 397, 403 (1955).

It was held in *United States* v. *Nugent*, *supra*, that defendant was not entitled to see the report of the F.B.I. nor to be informed of the names of persons interviewed by F.B.I. investigators, but that he was to receive a resume. It was held in *United States* v. *Simmons*, *supra*, that if the Department of Justice had failed to provide the petitioner with a fair resume of the F.B.I. report the hearing would have been lacking in "basic fairness" and a conviction resulting therefrom would be reversed.

It cannot be gainsaid that the Government's position that defendant is not entitled to the F.B.I. reports has been the position taken by a number of courts which have considered the matter. It derives support from *United States* v. *Nugent*, *supra*; it was so held in *Bouziden* v. *United States*, 251 F.2d 728 (10th Cir. 1958) and *Blalock* v. *United States*, 247 F.2d 615 (4th Cir. 1957).

However, if the failure to furnish a fair resume of the investigation is sufficient ground for upsetting a conviction, as was indicated by the Supreme Court in *United States* v. *Simmons*, *supra*, then certainly the defendant herein should have an opportunity of ascertaining whether the

resume presented to the Hearing Officer was a fair resume of the investigation reports of the F.B.I. In the present case the defendant urges that he intends to contend that the resume presented to the Hearing Officer was not a fair resume of the investigation reports of the F.B.I. If he cannot see copies of the reports how can he effectively make that argument?

While, of course, it is undesirable that F.B.I. reports be made available to defendants in criminal cases under ordinary circumstances, yet there are certain situations where justice requires that such disclosure be made. See *Jencks* v. *United States*, 353 U.S. 657 (1957). In the present situation it would appear that it would be impossible to afford defendant the defense to which he would be entitled under *United States* v. *Simmons*, *supra* (if such defense does exist) unless defendant had an opportunity to compare the resume which he already has with the F.B.I. reports which he is trying to get.

So much of the motion as seeks an order directing the United States Attorney to produce for examination, inspection and copying the reports of the agents of the F.B.I. is granted. However, the names and addresses of any informants which may appear in the reports may be eliminated from the reports before they are produced for inspection by the defendant.

The defendant has also served a subpoena for the production of these reports, and the Government has made a motion to quash the subpoena. In view of the determination of the instant motion it becomes unnecessary to pass upon the motion to quash the subpoena.

Dated: New York, N. Y.
February 2, 1959

ARCHIE O. DAWSON
U. S. D. J.

Office-Supreme Court, U.S.
FILED
MAR 31 1959
JAMES R. BROWNING, Clerk

No. 735

In the Supreme Court of the United States

October Term, 1958

JIMMY KATIS HOGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM ANDERSON,
Assistant Attorney General,
BEATRICE ROSENBERG,
Attorney,
Department of Justice, Washington 25, D.C.

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800841—59

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 735

JERRY KEITH ROGERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 9–15) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 2, 1959. The petition for a writ of certiorari was filed on February 28, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court properly quashed a subpoena for production of F.B.I. reports considered by the hearing officer in relation to petitioner's claim for classification as a conscientious objector, where

the hearing officer's résumé reported that the statements of witnesses were all favorable to petitioner.

2. Whether the classification of petitioner in I-A-O, available for noncombat service, had basis in fact.

STATUTE INVOLVED

Universal Military Training and Service Act, 62 Stat. 604, as amended:

> Section 6(j) [50 U.S.C. App. 456(j)]:
>
> Nothing contained in this title [sections 451-454 and 455-471 of this Appendix] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title [said sections], be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) [sec-

tion 454(b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title [section 462 of this Appendix], to have knowingly failed or neglected to perform a duty required of him under this title [sections 451–454 and 455–471 of this Appendix]. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such a claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title [said sections], he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the

period prescribed in section 4(b) [section 454(b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title [section 462 of this Appendix], to have knowingly failed or neglected to perform a duty required of him under this title [sections 451–454 and 455–471 of this Appendix]. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. * * *.

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals for the Ninth Circuit affirming his conviction of wilfully refusing to submit to induction in the armed forces as a noncombatant. Petitioner was sentenced to imprisonment for one year.

The selective service file, which was introduced in evidence, shows that petitioner, a member of Jehovah's Witnesses, registered with his draft board in November 1950. He sought exemption as a minister (F. 110)[1] and also filed the special form for conscien-

[1] The designation "F." refers to the selective service file; a photostatic copy of this file has been lodged with the clerk.

tious objectors (F. 98–105). The local board classified him I–A and petitioner appealed. Pursuant to Section 6(j) of the Universal Military Training and Service Act, his case was referred to the Department of Justice for hearing. Petitioner was given a summary of the result of the F.B.I. investigation, reading in part as follows (F. 77):

> Neighbors, references and acquaintances state that he has been an active member of the society and that he enjoys an excellent reputation of character. There is nothing in the investigative reports which would indicate he is not sincere in his claim to being a conscientious objector on the basis of his religious training and belief.

The hearing officer and the Department of Justice found that petitioner was sincere in his objections to combat service, but that his objections to noncombatant service were based solely on the contention that his induction would interfere with his religious activity. The Department recommended that petitioner be classified I–A–O (F. 75–76). On September 14, 1954, the appeal board classified petitioner I–A–O (F. 74).

Petitioner's case was reopened and he made a personal appearance before the local board. He answered a questionnaire largely concerned with his claim to ministerial status, but which also had some questions regarding conscientious objection. In response thereto he stated, *inter alia*, that he would not perform civilian work if classified as a conscientious objector since "The Bible says we shall not become friends of the World. Friendship with the World

is enmity with God." (F. 69). The local board classified petitioner I-A-O and the government appeal agent noted an appeal so that "all of the statutory rights of appeal may be exhausted in this case" (F. 64). The file was again forwarded to the Department of Justice for hearing. The résumé of the supplemental F.B.I. investigation again reported that the interviews had been favorable to petitioner. It read in part as follows (F. 53):

> Neighbors, references, and religious affiliates all agreed that the registrant is of excellent character and reputation and a sincere active member of Jehovah's Witnesses. None had any unfavorable information concerning the registrant's character; many of the same persons were previously interviewed and advised presently that they had no reason to change their opinion of the registrant. All persons interviewed believed that the registrant is sincere in his religious beliefs and in his attitude toward military service.

The report from the Department of Justice concluded that petitioner's position at the second hearing was essentially the same as at the first, although petitioner had stated, with respect to noncombatant service, that if one assists as a noncombatant, it is the same as killing. The Department reached the conclusion that "whereas the registrant has sustained his conscientious objections to combatant military training and service based on his religious training and belief, he has failed to sustain his conscientious objection to noncombatant military training and service" (F. 50-52). The Department recommended that

petitioner be classified I–A–O, available for noncombatant service.

After petitioner had received a copy of the Department's report, as required by this Court's decision in *Gonzales* v. *United States*, 348 U.S. 407 (see F. 49), he wrote a letter to the Appeal Board, stating in part as follows (F. 47):

> 1. My claim for exemption as a Conscientious Objector is based solely on the fact that I am a regularly ordained Minister of the Gospel.
>
> 2. Because of this I wish to notify the Board of my request to be classified as a Minister 4D. In support of this I submit the following information some of which you have on file.

Petitioner was classified I–A–O and ordered to report for noncombatant service (F. 42, 116). He reported but refused to submit for induction (R. 48–49).

ARGUMENT

1. The only question argued in the petition for a writ of certiorari is the propriety of the trial court's action in quashing subpoenas duces tecum, which petitioner attempted to have issued prior to trial, seeking production of the F.B.I. reports which were before the hearing officer (R. 4–10). As noted in the Statement, petitioner was given the résumés which were sent to the Appeals Board, and those résumés "contain only laudatory statements concerning [petitioner's] character, reputation and sincerity" (Pet. 13).

As the petition itself states (Pet. 6–7), the issue sought to be raised has been decided adversely to petitioner's contention by three courts of appeals since

the decision of this Court in *Jencks* v. *United States*, 353 U.S. 657; certiorari was sought in two of these cases and denied. *Leifer* v. *United States*, 260 F. 2d 648 (C.A. 6), certiorari denied, January 26, 1959, No. 525, this Term; *Bouziden* v. *United States*, 251 F. 2d 728 (C.A. 10), certiorari denied, 356 U.S. 927, No. 804, O.T. 1957; *Blalock* v. *United States*, 247 F. 2d 615 (C.A. 4). We respectfully refer the Court to the government's briefs in opposition in the *Leifer* and *Bouziden* cases.

The only new consideration advanced in this petition is the opinion of the United States District Court for the Southern District of New York in *United States* v. *Eliasson*, decided February 2, 1959 (Pet. 20–23) in which that court ruled, contrary to the decisions cited above, that a registrant was entitled to inspect the investigatory reports, but that the names and addresses of informants could be eliminated prior to inspection. The Second Circuit has not had occasion to pass on this issue, and there is thus no conflict among the circuits.

Certainly this is not a case in which there is any occasion to decide whether the doctrine of *United States* v. *Nugent*, 346 U.S. 1, should be qualified. Inasmuch as everything in the résumés of investigative reports was favorable to petitioner and the Appeals Board had before it all of the evidence which petitioner adduced, it is unreal to suggest that petitioner has suffered any prejudice.

2. Petitioner raises as a question (but does not argue) whether there was any basis in fact for classifying him I–A–O, available for noncombatant service.

This question was also before this Court, on essentially similar facts, in the *Leifer* case, No. 525, this Term, certiorari denied, January 26, 1959. In that case, as in this, the Selective Service System found that the registrant had conscientious scruples against killing; but that the religious scruples against killing were not the reason for refusal to do noncombatant work; that the refusal to perform noncombatant service, or indeed any service, was based on the notion that service would interfere with the registrant's ministerial duties. This objection to service is not recognized by the Universal Military Training and Service Act. *Tomlinson* v. *United States*, 216 F. 2d 12, 18 (C.A. 9), certiorari denied, 348 U.S. 970. There was thus evidence to support the selective service classification. *Estep* v. *United States*, 327 U.S. 114, 122.

CONCLUSION

The decision below is correct and there is no conflict among the circuits. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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